

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

DECEMBER 6, 2019

11:17 A.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

TRANSCRIPT PRODUCED BY:

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; December 6, 2019.)

THE COURT: Morning. Have a seat. Good morning, Counsel.

We are having Mr. McGuire participate by long distance; is that right? Are you connected okay?

MR. MCGUIRE: I think so.

THE COURT: All right. Can anyone else hear him -- everyone else hear him?

MR. TYSON: Yes.

THE COURT: All right. Very good.

I do want to note -- and I have authorized this before. But I realize what an integral part of the team -- in the Coalition's team here that Ms. Marks is but -- and that she has access to electronic equipment as well, which, you know, is within my authority.

But it is -- I want to make clear to you, Ms. Marks, that it is really permissive -- you cannot be recording anything and you cannot be in any way live tweeting or anything else like that. And I hope that is clear.

Because if you were to do that, you would never be allowed to have access to electronic equipment again. And I know you are a vital aide to your counsel. And that is why, you know, it is almost functioning as -- both as a client, paralegal, and in all capacities.

1 But I just want to be 100 percent clear about that,
2 that it would be in violation of my directives and in contempt
3 of these directives if you were to record or to tweet while you
4 are in here.

5 MS. MARKS: Thank you, Your Honor.

6 THE COURT: The parties asked for a status conference
7 in this matter about a variety of issues ranging from the
8 Coalition plaintiffs asking about implementation issues, to
9 asking about how we're proceeding on -- and if the Court is
10 proceeding on scheduling a preliminary injunction hearing and
11 what the schedule would be as to that, and asking for oral
12 argument, as well as a variety of other items that the
13 plaintiffs asked about.

14 And I have indicated in my -- and summarized in my
15 order of December 3rd, 2019, at Document 671, the state
16 defendants seek to address modifications in the current
17 scheduling order in particular with respect to whether the
18 Court is going to actually have a final trial or are we going
19 to cancel that trial that we referenced earlier in the spring
20 of 2019 and June 21st, 2019, and whether -- and directions
21 related to the preservation and decertification of the DRE GEMS
22 voting system.

23 So, first of all, the two issues raised by the state
24 defendants might be easiest. But the second one as to the
25 preservation and decertification of the DRE GEMS system might

1 relate to some of the other issues. I'll just put a pin on
2 that one but address the question of the scheduling of the
3 final trial.

4 While I never thought there needed to be a final
5 trial -- I thought we had done everything possible -- the
6 defendants had asked, I thought, originally to preserve that
7 possibility. And it still remains sort of lurking there
8 because the state has never indicated exactly what it was
9 prepared to do regarding -- on a final basis as to the Court's
10 preliminary injunction ruling. And yet we both have mootness
11 arguments that the state has made and, on the other hand, not
12 understandably wanting to be relieved of the possible specter
13 of a trial in January, which I concur with.

14 But it is a confusing posture. And all is related to
15 the argument, on one hand, that the DRE claims are moot and my
16 having issued a pretty comprehensive order already on the
17 evidence and then the state wanting to preserve the possibility
18 of appealing as a final -- in terms of the final order. It is
19 obviously not preceded with an interlocutory order -- appeal.

20 So if the state could clarify how it approaches this,
21 it would be -- as to the DRE claims and trial and contentions
22 of mootness and yet at the same time the contention you may
23 want to appeal what I have already issued on -- issued an order
24 on, it would be helpful to the Court and also helpful in
25 addressing your question.

1 MR. TYSON: Thank you, Your Honor. Good morning.
2 Bryan Tyson. I'll take the lead on addressing that question
3 for you.

4 I think to start with we kind of have to distinguish
5 between the question of the mootness of the DRE claims and the
6 new claims that are in as part of the ballot marking device
7 claims. The state is not going to use DREs ever again. They
8 were used for the last time on Tuesday in the runoff elections.

9 Not only does the state law prohibit the use now that
10 the ballot marking devices are being rolled out, Your Honor's
11 order has that in place. The state has purchased the new
12 system. And going forward, there will not be any use of the
13 DREs. And the state will not be appealing to try to obtain the
14 use of the DREs again.

15 There may be an appeal related to some of the legal
16 issues with the injunction on standing and some of those other
17 legal issues related to the case. But from the state's
18 perspective, we have abandoned DREs. We are not going back to
19 DREs. And we will not appeal anything related to trying to use
20 DREs again.

21 As far as the mootness piece goes in light of that,
22 we're now at a point where we have the DREs. We have ceased
23 using those. The Secretary of State in the coming weeks plans
24 to decertify that election system. And once the DREs are
25 decertified, they also cannot be used in Georgia.

1 We're at a place now where the collection of the
2 30,000 or 27,000 DREs, 8000 ExpressPolls is underway. Counties
3 don't have room to store both the new system -- the new
4 components and the old components. And the state is at a point
5 where we are ready to begin the process of recycling those
6 units and disposing of those.

7 THE COURT: You had -- this issue is -- you came up
8 first when I realized -- I think it was Page 12 or something of
9 your -- one of your briefs. And I just remember it jumping out
10 that you were representing at that point earlier in the fall
11 that you were collecting all of the -- and that you were
12 storing them. And that is why I assumed you were because you
13 represented you were.

14 MR. TYSON: Yes, Your Honor. And at that point, that
15 was the only process that was underway. Now that we've gotten
16 farther down the line, we're now at a point where the vendor
17 storing those DREs -- the vendor estimate is around \$300,000
18 per year to store all 35,000 different components of that
19 system.

20 And so since we are not going to use it again since
21 the ballot marking device rollout is on track, we are now at a
22 point where we don't want to continue to pay to store all of
23 those DREs, especially in light of the fact that there is
24 really nothing else that can be done related to those.

25 I think the only claim the plaintiffs can say in

1 response is, well, maybe some part of the election system is
2 still going to be used. You have Dominion on our preliminary
3 injunction motion saying they are not using any part of the
4 existing system. And I think the voter registration database
5 is the only piece that could still be used going forward. No
6 component of GEMS or DREs is going -- is going forward with
7 that.

8 And so we don't see a reason since those claims are
9 moot -- we're not going back to them, there is no further
10 relief that you can order on that front -- for the state to
11 continue to bear the cost of that storage. And there is no
12 reason to conduct discovery on claims that are moot.

13 THE COURT: So in whatever fangled way, your thought
14 was if you are going to appeal you are going to do it on some
15 of the procedural standing issues that, I would assume, might
16 arise in connection with the BMD issue? That you would say it
17 is an ongoing problem? Because you wouldn't be able to just
18 appeal a standing issue independent of the substantive claim --
19 a Fourteenth Amendment claim.

20 MR. TYSON: Yes, Your Honor. That is correct. And
21 the -- in terms of kind of how we're approaching this, we see
22 that there are continuing maybe issues related to jurisdiction
23 on the standing, those kind of questions. That is why we
24 didn't appeal from an interlocutory basis. We weren't
25 attempting to use the DREs again.

1 But at the conclusion of the case, there may be those
2 jurisdictional issues that can be reviewed on appeal. But like
3 you said, those would continue throughout.

4 THE COURT: Well, not to try to say that you don't
5 have a basis for any appeal, but I'm just trying to -- I
6 wouldn't understand logically here -- let's say that the -- for
7 whatever reason the BMD claims don't proceed. Are you saying
8 that you would have -- be in a legal posture to be able to
9 appeal these procedural issues of jurisdiction and standing?

10 MR. TYSON: So if the BMD claims cannot proceed, for
11 example, if they are dismissed, then I think we are probably at
12 the point of final judgment at that point or dismissal for
13 mootness. And I think -- I have not looked specifically at
14 that from a jurisdictional perspective. But I think that would
15 put us in a very different posture, yes.

16 THE COURT: Okay. So with respect to the eNet system
17 and the voter registration system, what are the -- what is the
18 machinery and equipment that you -- and databases that you
19 think are -- would be pertinent if you were on the other side
20 you would say you might want to keep that but all these other
21 machines can be disposed of?

22 MR. TYSON: Yes, Your Honor. The only component is
23 the eNet database itself, which is the in-use database. We
24 have snapshots of it at points in time if there needs to be a
25 review of it. That system is ongoing. It is not being

1 replaced.

2 And it is really the only thing, I think as you have
3 noted, that it was used to program the ExpressPoll check-in
4 units for the GEMS DRE system and to create -- and then that
5 system would then create the ballot access cards.

6 The same database and same data, a flat text file,
7 will be used to populate the Poll Pads. And also eNet is used
8 to create a paper backup that is used and has been used in
9 Georgia elections for years under both SEB rules and statutes.

10 So the only thing that we could think of and identify
11 is that if the plaintiffs want to study or look at the
12 architecture of that database they can do that. That database
13 isn't going anywhere. But, otherwise, none of the election
14 management systems are going to continue to be used. None of
15 the tabulation processes are going to be used.

16 Basically no component of that system -- of the GEMS
17 DRE system is going to continue after -- and I have been handed
18 a note. There is a runoff in the City of Morrow on
19 December 31st that will use DREs. That will be the last use of
20 DREs in the state.

21 THE COURT: And what about My Voter page and the
22 voter registration? Then you kind of used a new term actually
23 in one of your briefs that basically said that you had a
24 separate program from My Voter page to enter your change in the
25 address. Though when you go to the My Voter page, that is

1 where you get -- you, in fact, access whatever it is, which
2 I've asked about before, where you put your new address in --

3 MR. TYSON: Yes, Your Honor.

4 THE COURT: -- where it is not -- where it is
5 actually a two-way system. But you are saying that is routed
6 someplace else?

7 MR. TYSON: Correct, Your Honor. So the distinct
8 systems related to voter registration are eNet, which is the
9 voter registration database itself. That is the one that
10 registrars will edit. When you register to vote at DDS, it
11 appears on the dashboard of the registrar that you have
12 registered.

13 When you register to vote through online voter
14 registration, it also appears on the dashboard for the local
15 county in eNet. They then must take action before that
16 information is inputted into the actual voter registration
17 database.

18 The My Voter page is a snapshot of the eNet database
19 at a particular point in time. So it is a read only. A voter
20 can look up their information. But if they click to say I want
21 to change something, they are taken to the online voter
22 registration system. That system will then send information to
23 the county registrars that they are then able to say we're not
24 going to put this in or will put this in.

25 So it is not like a voter is able to actively edit

1 the eNet database themselves. They have to do that -- all of
2 those systems will remain in place, the eNet system, the My
3 Voter page, the online voter registration. None of those
4 systems are changing with the adoption of the new voting system
5 for the election process.

6 THE COURT: So just to roll back here, in summary,
7 are you basically saying that is not an equipment or
8 server-based or are you -- or are you saying -- is that the
9 bottom line? Or are you saying it is both -- it has a basis in
10 terms of the servers for any of the facilities that are
11 coordinating the databases or working with them plus the
12 database?

13 MR. TYSON: Right. So these will function on servers
14 that people can access. But these systems don't have any --
15 they are not the same and don't have to share any components
16 with the DREs and the programs used to program DREs. They
17 don't share any components with the ExpressPoll units and what
18 is used to program ExpressPolls. And they don't share any
19 components with GEMS and what is used to program then those
20 other components.

21 So those systems and components are separate and
22 apart from the eNet online voter registration and My Voter page
23 servers and setup.

24 THE COURT: Let me just be literal and ask
25 plaintiffs' counsel to respond to that and go back and see if

1 we can do one thing at a time.

2 MR. TYSON: Yes, Your Honor. Thank you.

3 MR. BROWN: Your Honor, Bruce Brown for the Coalition
4 plaintiffs. We would separate the discussion as I think as
5 anticipated by the prior discussion between the jurisdictional
6 and formal disposition of Your Honor's preliminary injunction
7 and its future status as a preliminary or a permanent
8 injunction, on the one hand, from the discoverability and
9 preservation issues of the GEMS system, on the other.

10 And so we would not have an objection to the
11 conversion of your preliminary injunction into a permanent
12 injunction and would agree that a trial doesn't seem to fit
13 anybody's desire or necessity at this point and that it can be
14 treated as a permanent injunction because it is so exhaustive
15 and so extensive and because the state isn't suggesting
16 otherwise.

17 But that on the discoverability of the old GEMS and
18 DRE systems, it is a separate issue. We can address that. But
19 we have -- there is a need to conduct discovery on the entire
20 system for the claims going forward. That is one aspect of it.
21 And there are many different reasons.

22 The long story short is the state is asserting that
23 the systems are separate and has made that representation in
24 the past. But this is discovery, and we're entitled to test
25 that with our experts to see exactly how all of this data is

1 migrating and what care is being taken to disinfect whatever is
2 coming from the GEMS system into the new one.

3 So we would think there is an entirely different
4 argument, if you will, on the discoverability. But on simply
5 your jurisdictional question, we would agree that it could be
6 treated as a permanent.

7 THE COURT: Well, what would be a credible basis for
8 my thinking at this juncture that the GEMS data is being
9 imported? I understand you have a credible basis as to
10 anything involving eNet and the voter databases. But I don't
11 understand it as to the other -- the structure of the GEMS
12 system and the way it functions. And I don't understand what
13 the facts are that you have alleged that would make me conclude
14 that that is credible.

15 MR. BROWN: We don't have the facts either, and that
16 is part of why discovery would be necessary. But the GEMS
17 database is a gigantic access database that could be copied
18 into the new system in many different ways. You could
19 conceivably do it with a series of key strokes that would just
20 simply convert that access database into a table of
21 comma-separated values that could just be copied, malware and
22 all, into the new system.

23 Now, they claim that is not what they are doing. But
24 we don't know if they are rekeying it or how exactly -- what
25 sort of process they are taking that old database and that

1 structure and putting it into the new one. So that would be
2 one of the issues.

3 The other on sort of a different plane is that --

4 THE COURT: But even if that is so -- and I don't
5 know -- you are candid in saying you don't have any basis one
6 way or the other for thinking it is so. But let's say it is
7 so. Wouldn't that be the state system and the state servers,
8 not every one of the very large number of counties' systems
9 that are extant?

10 MR. BROWN: Yes, Your Honor. I think the degree and
11 the extent of discovery that would be reasonable is open to
12 question. And we would not have any desire to undertake more
13 than we needed to be able to see -- to determine the sources of
14 the anomalies that were present in the old DRE system,
15 including the undervotes on the lieutenant governor, the truly
16 alarming data from the African-American precincts, and a number
17 of other things that we have never had discovery on.

18 THE COURT: I just don't -- I don't get it. I mean,
19 I understand if the state -- if we were continuing on this old
20 system, absolutely. And -- but if I don't -- there is no
21 indication that the Dominion system is being programmed with
22 the GEMS data system and you have no basis for alleging it, how
23 do I allow -- basically say at this juncture they shouldn't at
24 least be able to dispose of their machines or are there 20 you
25 want kept? Are you wanting Fulton County's kept elsewhere so

1 that Fulton County can continue to have room? But presumably
2 if all the other major ones are cleared out, that you have got
3 Fulton County and some other county, that is something
4 different even just to preserve the possibility but -- or if
5 you want three or four counties.

6 But I mean, I just don't see what they are saying is
7 unreasonable because -- and you haven't explained to me why you
8 should be able to go really fishing back at this juncture. It
9 might be that the people in Fair Fight have something that they
10 are particularly interested in. They have claims about --
11 Fourteenth Amendment issues also. And I understand that that
12 is a separate lawsuit though.

13 So whatever they do is something else about
14 Fourteenth Amendment equal protection issues. But I just -- I
15 don't understand what you are -- what is the factual or legal
16 basis for my saying that they shouldn't be able to dispose of
17 all of -- or most of the county's machines. The state server
18 is something completely different.

19 MR. BROWN: Right. You are right, Your Honor. There
20 is the separate -- I think we have separately docketed a
21 dispute over the discovery on the state servers. That is
22 separate. And then we also have the FBI server, which we --

23 THE COURT: I understand that. That is something
24 different.

25 MR. BROWN: On the rest of that, we would agree that

1 it would be reasonable and it would be fine with us to limit
2 our discovery to a subset of the gigantic universe of this old
3 equipment into something that is targeted that cannot be a
4 burden on the state because they are not -- it is not
5 disrupting the state at all.

6 THE COURT: Well, at the point that they have to keep
7 more machines than they have room for and they have to pay a
8 lot of money for it, it is disruptive.

9 MR. BROWN: Sure. That would be -- you are right,
10 Your Honor. Of course. I'm not belittling any expense of the
11 state. But it would be a narrow subset of that big universe
12 that would be important on that.

13 THE COURT: I understand what you are saying -- your
14 position. I'm not saying -- making -- in any way acknowledging
15 anything about the right to discovery on anything. You just
16 want -- but I'm looking at it as a preservation of an
17 opportunity but without knowing exactly where you are going
18 with all of that, frankly.

19 Did counsel attempt to or -- go ahead, Mr. Cross.

20 MR. CROSS: Just briefly, Your Honor. On the
21 mootness issues, my colleague, Ms. Kaiser, will address that
22 within the context of the motion to dismiss if you have
23 questions on that.

24 There are two issues here. There's preservation, and
25 there is schedule. I wanted to, I guess, take those separately

1 because I know they overlap.

2 I guess the starting point that I would make, Your
3 Honor, is where Your Honor was, which is we're in an unusual
4 posture. I'm not sure how this gets resolved. And it
5 implicates the schedule. It implicates preservation, which is
6 the defendants have taken conflicting positions. On the one
7 hand, when we want discovery, they say, no, no, no, the case is
8 over. The DRE claims have been resolved by the Court. But
9 then, for example, when we seek fees and costs as a prevailing
10 party, they say, no, no, no, those are still live claims, they
11 haven't been resolved. Those are diametrically opposite
12 positions.

13 And I'm not sure where it gets us at the end of the
14 day. Because if, for example, Your Honor takes the trial off
15 the schedule in January or spring, where does that leave us?
16 This case just sits forever on your court's docket? You have
17 got to get to a judgment. Either they can consent to a
18 judgment, which we have asked them to do. They have declined.
19 Or Your Honor presumably could enter a judgment on the record
20 before you since they themselves have said there is no more
21 discovery needed, there is no more discovery that should be
22 allowed. Then I would ask Your Honor then just enter a
23 judgment that just takes your existing order that says they
24 have declined to -- declined any opportunity to put any more
25 evidence in. Your Honor has resolved those issues. Let's get

1 a judgment at least on the DRE claims and move forward.

2 But absent that, if they are not going to consent or
3 if they are going to object to Your Honor doing that, these are
4 live claims that have to get resolved in one way or another.
5 If that means a hearing and that means additional discovery,
6 then that bears on the preservation issue.

7 And so my bottom line position, Your Honor, is they
8 can't have it both ways. They can't say the claims are dead,
9 there is no more discovery, so let's move on, and they can
10 destroy everything but then at every opportunity oppose any
11 final judgment on those claims. They have got to pick a
12 position, one or the other.

13 And if they are going to continue to say no judgment,
14 Your Honor has to resolve that on the merits in some fashion,
15 then everything we're talking about has to get preserved or at
16 least to Mr. Brown's point a statistical sample that we could
17 work something that keeps alive what we would need to resolve
18 those claims on the merits.

19 The burden issue, Your Honor, again, if we can take a
20 small sample. He said it is 300,000 a year for 35,000
21 components. We have statistical experts that have been ready
22 for years to try to work this out to some sample. We could get
23 that down to probably a really small number if you take a
24 fraction of 300,000 out of 35,000 components.

25 The last point, I won't repeat what Mr. Brown said

1 but other than just to say discovery is important on this. It
2 is not enough for them to come to the Court, Your Honor, and
3 say, well, Dominion says they are not going to use any of the
4 existing components. But then at the same time Mr. Tyson says,
5 but we are using eNet. There is going to be overlap with the
6 registration. We don't know are these people that are building
7 ballots in their home -- are they continuing to build ballots
8 in their home? No one has ever looked at the GEMS server. So
9 we don't know the reach of the vulnerabilities that exist in
10 the current system and what may transfer to the new system
11 without discovery, Your Honor. Thank you.

12 THE COURT: Well, let me ask you this: The state
13 argues that they might want to still appeal some procedural
14 issues like jurisdiction or standing.

15 MR. CROSS: I'll confess I don't understand the
16 procedural possibility of that either. I mean, maybe that is
17 an issue for the appellate court. But I don't -- I don't
18 understand how you appeal something when you are not entitled
19 to the relief.

20 THE COURT: Is there something as to -- remaining as
21 to discovery on DREs for the original claims that you are
22 saying that must be maintained given the current factual
23 posture of the case where -- and elections in Georgia?

24 MR. CROSS: Again, it is hard to answer because I
25 don't understand where they really are on this. So if they are

1 still disputing the factual findings in Your Honor's order --
2 right? If they are still telling this Court that there are no
3 significant vulnerabilities with the existing equipment with
4 DREs and GEMS and Your Honor has gotten some aspect of that
5 wrong and they are not willing to consent to a judgment and
6 they are not willing to let Your Honor decide that on the
7 existing record, enter a final judgment that turns on the prior
8 briefing in the hearing, then those are live claims. We would
9 have to come forward and prove up to Your Honor not just a
10 likelihood of success as we did before but actual success on
11 the merits.

12 And that will require, I suspect, given the defenses
13 they have offered before that our vulnerabilities are
14 speculative -- that would require some analysis of the GEMS
15 servers, like their own experts emphasized.

16 And I'm struggling because I don't know where to go
17 here because they are taking conflicting positions to try to
18 get to an outcome they like. But they have got to pick a horse
19 and ride it. And right now they are riding in opposite
20 directions.

21 THE COURT: So do you have any -- do the Curling
22 plaintiffs have any issues with basically winnowing down
23 significantly the number of DRE machines that need to be in
24 storage? I gather not from what you said.

25 MR. CROSS: If we can do that in a cooperative

1 fashion with statistical experts and get Your Honor's help if
2 needed, then no. I think we have always felt comfortable that
3 there is a statistical sample of the components that we would
4 use.

5 THE COURT: And have you ever determined what that
6 is?

7 MR. CROSS: We haven't because there is additional
8 information that would be needed on that. I know when you get
9 back to the summer of 2018 they did provide some information
10 that our experts were able to at least get some ideas where I
11 think we were talking -- I would say somewhere between -- maybe
12 the smallest number would be a few or several hundred, I think,
13 was kind of in the ball park of what our statistical experts
14 were thinking. So a small number.

15 THE COURT: But why in the context -- are you
16 maintaining still what Mr. Brown is, that there might have been
17 an importation of GEMS data into the new Dominion system?

18 MR. CROSS: Yes. And Dr. Halderman has addressed
19 that in his testimony. We are very concerned that there is
20 taint from the existing system to the new system because we
21 don't yet know because we don't have discovery on what the
22 different vector points are. What are the touch points between
23 the new system and the old system?

24 They say they are not using any of the old
25 components. But, again, they are using eNet. There is going

1 to be voter registration overlap. We still don't have much
2 visibility into the ballot builders working out of their homes.
3 Are those people going to continue to build ballots? Are they
4 using the same computers that they used before? We don't know.
5 So it is -- we just don't know what we don't know.

6 And with all due respect to opposing counsel, we have
7 learned through this case that their representations to the
8 Court are often not accurate. So we're not comfortable just
9 taking as a given that because they say there is no overlap
10 that means there is no overlap.

11 THE COURT: Well, there is information available to
12 your experts and in the election software literature as to what
13 software Dominion uses on these versus -- BMDs -- excuse me --
14 versus what was used for the GEMS system.

15 MR. CROSS: And Dr. Halderman has testimony we have
16 put into the record that walks through that on the -- I think
17 the preliminary injunction addresses that. Then we had a call
18 back in August -- Your Honor may recall -- a discovery call
19 where that was the first time that they seemed to walk back the
20 idea that there was a complete divide, that these were two
21 totally separate systems. And if I remember correctly, it
22 seemed everyone was a bit surprised to hear that on that call.

23 So Dr. Halderman is in the best position to walk
24 through that.

25 THE COURT: Well, you would have to point that out to

1 me. Because I understand it as to the voter database and to
2 eNet and have continually expressed my concern about that. But
3 you would have to explain that to me.

4 MR. CROSS: That is why we would ask --

5 THE COURT: Point that out to me.

6 MR. CROSS: Understood. We would ask for some
7 discovery and a hearing on that to resolve that, Your Honor.

8 THE COURT: Well, you are saying he's already opined
9 on it. I just don't remember him opining on it other than as
10 to the voter database.

11 MR. CROSS: I believe he talked about eNet as well.
12 I thought --

13 THE COURT: Well, as to eNet, I understand. But I'm
14 just -- we're talking about the rest of the DRE functions. And
15 eNet is a different system. I mean, I understand it draws on
16 some of the GEMS material. But that is from the state server
17 as I understood it.

18 MR. CROSS: Right. But we don't -- I guess the point
19 I come back to, Your Honor, is we don't know how the ballots,
20 for example, are going to be built. One of the biggest
21 infection points or vector points in the existing system is the
22 internet connections, for example, and then how the ballots get
23 built.

24 And so we've not heard anything -- we don't have
25 discovery on that. And so, again, if it is the same people

1 building the ballots on the same equipment --

2 THE COURT: That is not really the focus of your
3 current complaint though.

4 MR. CROSS: I guess respectfully I would disagree,
5 Your Honor, because it is all part of the same election system.
6 If those folks are still being used and if their equipment is
7 infected in the same way that the GEMS database or GEMS servers
8 might be --

9 THE COURT: Well, certainly your original
10 complaint -- and you filed an amended complaint. Your folks
11 and the Coalition folks filed a supplemental claim so it is --
12 you know, you obviously incorporated some of your old concerns.
13 But it doesn't have allegations in my mind -- and you would
14 have to point them out to me -- about the dysfunctionality of
15 the system as to the new system in this way and the taint of
16 it.

17 And it may well be so. But it sort of goes --
18 frankly, while you are up here, it goes to the problem I'm
19 having with the new counts, which may be completely viable
20 counts in the long run. But I'm concerned that it is not
21 right. We don't have experience yet with how it has been
22 impacted, how it is operational.

23 You have to complain and do complain understandably
24 about the -- from your perspective about the -- the whole way
25 that the bar code functions and that we don't really have a

1 verifiable ballot and that there are other components of that
2 as well.

3 But it was not old software, dysfunctional software.
4 It was just the state's decision to select the vendor's
5 cheapest option apparently, which was a bar code that isn't
6 verifiable and that no one can be sure what it actually is
7 recording and that we can't -- we can't on a ballot by ballot
8 basis be auditing it from your -- as I understand your
9 argument.

10 MR. CROSS: At an essential level, yes. I guess two
11 thoughts, Your Honor, on the ripeness. One, this system has
12 been rolled out. It was rolled out in 2019. We have got
13 information in the record on the PI motion. We'll have more on
14 the reply.

15 Mr. Brown can speak to this as well. We do know that
16 this system has lots of fundamental flaws. So I would say if
17 Your Honor is concerned that we're not there yet we're there
18 and we are beyond because there has been an election on the new
19 system.

20 But more importantly I would say, Your Honor --

21 THE COURT: But -- all right. You have some
22 experience. And they ran these trials so that they would get
23 some experience, just as they ran the paper ballot so they
24 would get some experience in case there was a need.

25 But I'm not sure it is fair and meaningful to say,

1 well, that is indicative of everything that is going to happen
2 in terms of the operational dimension as opposed to simply the
3 design. Because the whole purpose of this was to try to -- the
4 sample runs -- and they were also in small -- relatively small
5 counties -- was to see how it functioned and to correct the
6 dysfunctionalities in operation.

7 MR. CROSS: Right. And the second point I was going
8 to get to, Your Honor, is the bar codes. I don't want to jump
9 the gun on the PI hearing. But if you read -- they have
10 submitted two briefs in this case now to defend the new system,
11 the motion to dismiss and the PI.

12 In the motion to dismiss, I think they didn't utter
13 the word bar code at all. Maybe once. In the PI, it is quite
14 similar. What they are doing is they are trying to defend a
15 system that has not been adopted in the State of Georgia. They
16 are defending BMDs without bar codes.

17 And all of the evidence almost exclusively they cite
18 in their arguments are BMDs are great. They say there are
19 election experts that support BMDs. But there are no election
20 experts they pointed to that support bar-coded BMDs except the
21 one person they have a declaration from, who by the way sells
22 his own bar-coded BMDs. This is a man that is heavily invested
23 in defending bar-coded BMDs.

24 The only point I would make is we have a system that
25 we know doesn't even comply with the Georgia law. Right? It

1 is supposed to be voter verifiable. There can be no dispute
2 that this is not a voter verifiable system. So I would submit,
3 Your Honor, the ripeness and the standing are even easier here
4 than with the DREs.

5 With the DREs, that turned on election
6 vulnerabilities. Right? And their refrain was always this is
7 speculative. You are saying it can be hacked. There has been
8 no hack. Put aside the fact they would never allow anyone to
9 look. Here, we know that there is a system that, one, doesn't
10 meet what the state has said is the minimum requirement, voter
11 verifiability, and, secondly, isn't consistent with your own
12 prior orders in terms of -- and Supreme Court law on how the
13 voter should be able to have confidence and know that the vote
14 they cast at the moment they cast it is what they intended.
15 That cannot happen in this system.

16 So the claim is absolutely ripe, Your Honor. And I
17 think you could probably resolve it pretty quickly because it
18 is an indefensible system to say bar codes. Notice absent in
19 all their briefing is not even an explanation of why they chose
20 bar codes. They didn't have to.

21 They could have chosen a system that scans the human
22 readable portion. We already know from the pilot elections. I
23 think it was Cobb County's superintendent that said the hand
24 marked paper ballots went far better, much easier than any of
25 the BMDs. They were thankful with Your Honor's order because

1 they got hand marked paper ballots and didn't deal with that
2 disaster.

3 And so the final point I'll make is I don't think it
4 is fair or appropriate or legally sufficient to say, well, yes,
5 they get a little bit of a pass on the pilot because it is a
6 pilot.

7 What we know is that they have got a system that does
8 not look like it will be in place ready for March. And if we
9 wait, the ripeness becomes a real constitutional crisis.
10 Right? Because if the primary falls apart or goes like the
11 2019 election did, that is a serious problem and you can't fix
12 that other than what do we do. We do a redo. So now is the
13 time to deal with that.

14 THE COURT: Maybe this is a better question for Mr.
15 Russo or one of his colleagues. The state represents in its
16 brief that the voter organization -- I can't remember the name.
17 Voter -- it is not AccuVote obviously -- but indicates that
18 there are 44 jurisdictions or states that are using some form
19 of BMD.

20 Of course, some of them are probably -- it is not --
21 most states don't do it statewide. So I am assuming what you
22 mean is that there are jurisdictions within 44 states that use
23 the BMD.

24 How many -- in how many locations are they using a
25 bar code BMD?

1 MR. TYSON: Your Honor, that would be almost all of
2 them. I believe there is only one or two EAC-certified BMD
3 systems that do not use bar codes. Currently, the vast
4 majority, if not 90-plus percent of the EAC-certified ballot
5 marking device systems, use bar codes.

6 There is a reference cited in the plaintiffs' brief
7 to Colorado moving away from bar codes. They acknowledge in
8 that article that there is no certified system that they can
9 use right now that currently doesn't use a bar code. I know
10 that is under development and is underway. But that is the
11 scope of kind of where things stand right now on the use of bar
12 codes nationwide.

13 THE COURT: I thought that when the ballots go into
14 the central office they are scanning the whole -- they had
15 another machine that simply scanned -- gave an entire
16 non-condensed ballot page that you could actually go and read
17 the entire page, first of all.

18 Is that right?

19 MR. TYSON: So are you referring to an absentee
20 ballot where you would bubble that in and the scanner would
21 scan the absentee ballot?

22 THE COURT: Right.

23 MR. TYSON: Yes. So that is that. That is referred
24 to as a full ballot printout. The EAC-certified ballot marking
25 device system -- I think it is Hart and maybe one other

1 manufacturer that have that -- generate that same kind of
2 information when they print that out. That uses a lot more
3 paper. If you have double-sided ballots, it is a lot more
4 complicated to deal with.

5 So when the ballot marking device prints out a
6 ballot, it is one page with a bar code and then a human
7 readable portion. Then the audit that takes place afterwards
8 audits the human readable portion of the ballot.

9 THE COURT: So recently there was eNet and ES&S --
10 and now that vendor is gone. I'm forgetting the exact
11 initials -- enormous snafu in Pennsylvania, which you probably
12 are aware of --

13 MR. TYSON: Yes.

14 THE COURT: -- where they -- thousands of votes were
15 missing. And they had to go back and look at the -- what type
16 of system -- was there a bar code there?

17 MR. TYSON: Yes, Your Honor. There was a bar code
18 used there. But that is a dramatically different system.
19 Dr. Gilbert, our expert in the PI, actually criticizes the
20 kinds of systems that were used in Pennsylvania because they
21 combined both the printing and the scanning in the same unit.

22 The voter sees the ballot behind glass but doesn't
23 get to actually handle it. The scanning takes place in the
24 unit. He is very critical of those kinds of systems and
25 prefers systems like Georgia's where there is a printout, the

1 voter has a chance to verify it, and a separate scanning
2 system. So it is not taking place in the same unit.

3 So our technology and our manufacturer are
4 dramatically different than the ES&S system that was used in
5 Pennsylvania.

6 THE COURT: Let me just ask you a very kind of
7 operational issue. Do you have to close out your ballot in
8 order to print the ballot?

9 MR. TYSON: Yes, Your Honor. So the equivalent of
10 pushing the cast ballot button on the DREs right now, the
11 similar functionality there is what initiates the printout.
12 You then have a chance to review it. If you say, oh, no, that
13 is not what I -- I meant to vote for this person instead of
14 this person, the election officials can then spoil that ballot.
15 It is disposed of. You go create another ballot on the unit.

16 And so the electronic memory of the ballot marking
17 device does not maintain an electronic copy of the ballot. The
18 paper is the governing copy.

19 THE COURT: So you can't stand next to your -- to the
20 machine and look at your ballot and look at the screen?

21 MR. TYSON: The screen?

22 THE COURT: That's right.

23 MR. TYSON: Correct.

24 THE COURT: All right.

25 MR. CROSS: Your Honor, just to clarify a couple of

1 points, included in the RFP that Georgia had, one of the
2 vendors was a vendor that had BMDs where there was no bar code.
3 So the suggestion that there is no currently available system
4 that uses BMDs without a bar code, that is not accurate. They
5 rejected that. There is no explanation as to why.

6 And you will see this when we file our PI reply. The
7 statistics they have provided on other jurisdictions using BMD
8 bar codes, those numbers, as I understand, are exaggerated.
9 And we will lay that out for Your Honor.

10 But, again, that is getting beyond where we should be
11 on a ripeness issue, which turns on the face of the complaint.
12 And, again, Ms. Kaiser will answer any questions on the motion
13 to dismiss.

14 But the central point I want to be careful about here
15 is they wrote a brief on a motion to dismiss that reads like a
16 summary judgment. It has a literal statement of facts. You
17 don't see that in a Rule 12 motion because the statement of
18 facts in a Rule 12 is our complaint.

19 And so it is not appropriate for them to come in and
20 say, well, on jurisdictional issues, we can go a little beyond
21 the scope of the complaint. If you look at the law, there is
22 some flexibility there. But, one, we're entitled to discovery
23 and a hearing on that if it is disputed facts -- these facts
24 are disputed -- if Your Honor is going to resolve those.

25 Your Honor is not permitted respectfully, Your Honor,

1 to just simply take their representations and say, well, I'll
2 just take those as the facts and decide a jurisdictional issue.
3 That is not how it works.

4 THE COURT: Well, I understand that. And this is a
5 question of a factual versus a facial challenge. And I plan to
6 ask the defendants about that.

7 But what is true is that there had been considerable
8 experience and a considerable record as to the DRE system and
9 lots of literature about it as well but -- lots of
10 experience -- hands-on experience and hands-on misadventures,
11 kindly stated, of individual voters with the DRE system and the
12 operation of the state system.

13 Whereas, here, that is not so. That is why I raised
14 the ripeness issue. I mean, because under Eleventh Circuit law
15 if I find there is a ripeness issue, it is dismissed without
16 prejudice. It is simply, you know -- yes, you wait for a
17 potential disaster, from your perspective.

18 But it is not -- it is this -- it is what it is. And
19 you have to start anew.

20 MR. CROSS: Your Honor, again, that is why I think it
21 is important to focus on the system here and why it is so
22 telling in their briefing that they don't defend this system.
23 They don't defend bar codes.

24 And if we -- to be candid with Your Honor, if they
25 had adopted a non-bar code BMD system, whether we would have

1 filed the supplemental claims, I don't know. We're not in that
2 posture but if we had -- or the amended complaints. If we had,
3 I will confess that is a much harder case. There are election
4 experts that they could pull in that would say BMDs are okay.
5 But the overwhelming view is, if you are going to use bar
6 codes, that is a problem. Remember, Dr. Shamos agreed. Their
7 own expert said, don't use bar codes. Then a week later, they
8 adopted bar codes.

9 I think it is -- I would submit, Your Honor, it
10 should be, I would hope, an easy decision for the Court to say
11 on ripeness and on standing, if you are using a bar code, that
12 is not voter verifiable. There can be no dispute about that.
13 And --

14 THE COURT: But it is not voter verifiable in the way
15 perhaps that the state statute intended originally. But then
16 isn't that a state claim?

17 MR. CROSS: Well, but we have a constitutional claim.
18 What I would say, Your Honor, is what the state -- they like to
19 tell us the state legislature adopted this -- right? -- and
20 that we're circumventing the state legislature's authority. I
21 would say no. The Secretary of State has done that. Because
22 the state legislature acknowledged what we say, which is the
23 minimum threshold for a constitutional vote in an election
24 system is voter verifiability. They wrote that into the law.

25 Could we bring a state claim? Sure. But we don't

1 need to. Because what the legislature said was any system has
2 to meet that basic threshold. That is what the Constitution
3 requires. If it is not voter verifiable, it doesn't just
4 violate the state law, it violates the federal law because that
5 is what the legislature was recognizing.

6 Voters need to have confidence. They need to walk
7 in, look at their ballot, be able to read it, and know that
8 what is going to get counted is what they intended. At least
9 at that moment, the moment it goes into the scanner, what is
10 getting tabulated is what they intended.

11 Instead, it is almost worse than a DRE. At least
12 with a DRE, they can read their selections and hit send. So
13 they know the moment they hit cast ballot that what they are
14 casting is what they intended. Now, what happens --

15 THE COURT: Maybe, maybe not.

16 MR. CROSS: Well, on the back end, maybe, maybe not.
17 That was what we litigated here.

18 THE COURT: I mean, if the problem is partly the
19 circuitry of old machines, et cetera.

20 MR. CROSS: Fair enough. Fair enough. That is true.
21 But I would say here it is worse because in every single ballot
22 cast -- every single ballot cast, the moment they cast it, they
23 have no idea what is being tabulated. So it is far worse than
24 where we were with the DREs. And it should just be inherently
25 unconstitutional.

1 And the fact that other states have adopted it, lots
2 of states used DREs for a long time. That doesn't tell us it
3 is constitutional.

4 MR. BROWN: Your Honor, if I may just as a point of
5 reference, a couple of things.

6 As Your Honor is aware, both sets of plaintiffs make
7 a broad claim that as designed these systems are
8 unconstitutional -- as designed for the reasons that Mr. Cross
9 expressed and that we have said before is that if you put a
10 computer between the voter and that --

11 THE COURT: All right.

12 MR. BROWN: It is -- however, the Coalition
13 plaintiffs also claim -- and this is at Paragraph 177 about 10
14 paragraphs after that. Specifically, we make plausible
15 allegations that the new system, in fact, contains the malware
16 from the old system. We lay that out in some detail.

17 So we also make a more specific operational issue.
18 And those -- those are allegations of fact, which are plausible
19 and for the purposes of the motion to dismiss and for ripeness
20 need to be accepted as true for now.

21 In terms of the numbers of bar code devices, the
22 record is that many, many jurisdictions use bar codes for ADA,
23 not for the entire population as they do in Georgia. And so
24 those numbers are indeed exaggerated.

25 Thank you, Your Honor.

1 THE COURT: You say 177?

2 MR. BROWN: I believe it is 177 to 181, Your Honor.

3 **(There was a brief pause in the proceedings.)**

4 THE COURT: Mr. Brown, are your procedural due
5 process claims still -- you are still proceeding with? I know
6 that the -- it seemed to me that the Curling plaintiffs had --
7 at least to the extent that they appeared to be -- I don't
8 think that you were proceeding with a -- am I incorrect as to
9 the Curling plaintiffs? I'm sorry. Let me just finish up with
10 Mr. Cross.

11 Were you proceeding with the procedural due process
12 claim?

13 MS. KAISER: Your Honor, Mary Kaiser for the Curling
14 plaintiffs. No, Your Honor.

15 THE COURT: Go ahead, Mr. Brown.

16 MR. BROWN: Your Honor, I would like to defer to Mr.
17 McGuire who is on your TV screen. And I neglected to mention
18 my appreciation to Mr. Martin for taking the time to set that
19 up. We do appreciate that.

20 THE COURT: Mr. McGuire, did you hear? Are you on?
21 Can you speak up?

22 MR. MCGUIRE: Can you hear me?

23 THE COURT: Let me see whether we can get you a
24 little louder.

25 COURTROOM DEPUTY CLERK: Try again, please.

1 MR. MCGUIRE: Can you hear me?

2 THE COURT: Yes.

3 MR. MCGUIRE: So, Your Honor, you are asking about
4 the procedural due process claim in our third amended complaint
5 against DREs or about the different procedural due process
6 claim that we are now pursuing?

7 THE COURT: The ones you are now pursuing.

8 MR. MCGUIRE: Yes, we are pursuing those. We think
9 that they are actually different -- some of the same violations
10 but some different underlying violations of underlying
11 state-created rights and liberty interests that are affected by
12 BMDs in a manner slightly different. Some similar, some
13 different with the BMD system as opposed to the DRE. We are
14 pursuing those claims.

15 THE COURT: What do you say with respect -- in
16 response to the argument under *McKinney*? That you -- basically
17 you had to go through -- pursue your state remedies, that you
18 don't have -- it is not a final due process -- procedural due
19 process claim until you have actually gone through your state
20 remedies, which would be that you have adequate state remedies
21 to address any of your state law claims -- state law-based
22 claims?

23 MR. MCGUIRE: Well, I'm not sure what the -- I guess
24 I'm not understanding what exactly the state law remedies are
25 that they believe exist that are adequate. Because none of the

1 ones that are available to us to pursue would allow us to
2 address the problem directly, for example, by bringing a state
3 law injunction. And we're not allowed to do that under
4 state -- in a state court under sovereign immunity directly as
5 a pure state law violation.

6 The underlying -- the underlying violations of state
7 law are all insulated from attack by Georgia's sovereign
8 immunity doctrine. So for us there is no real mechanism
9 outside of the federal claim to obtain a remedy for these
10 violations of underlying state rights, such as the Georgia's
11 state right to a secret ballot, the Georgia state right to vote
12 on a voting system that has been properly certified that is
13 safe to use.

14 These are not things that we can challenge in state
15 court. So the federal remedies is the only remedy available to
16 us. So we've alleged that there is not an adequate legal
17 remedy, and they haven't placed anything in front of the Court
18 that is a specific alternative.

19 The Court's already found in connection with the DRE
20 claims that the reexamination procedure doesn't -- doesn't seem
21 to qualify, not least of all because it doesn't appear to be
22 being handled by the state in good faith.

23 It has been prejudged that whatever hoops they have
24 to jump through for the reexamination process they have
25 prejudged. It won't have any impact on their rollout of the

1 BMD system. And that's similar to the way they handled an
2 analogous reexamination request directed at the DRE system.
3 And this Court found previously or at least said in a footnote
4 of one of its orders previously that the reexamination process
5 was not -- did not appear to be sufficient as a remedy.

6 So we have alleged there is not an adequate legal
7 remedy. And I think at this point the burden would be on them
8 to show what the legal remedy is that we could pursue because
9 there isn't one that we see, other than the federal due process
10 angle.

11 THE COURT: Were defense counsel able to hear?

12 MR. TYSON: Yes.

13 THE COURT: I should have asked beforehand, but I
14 would expect you to jump up if you couldn't.

15 MR. TYSON: Yes, Your Honor, we were. Of course, if
16 we could direct our opposing counsel to the *Lathrop* case from
17 the Georgia Supreme Court about dealing with sovereign
18 immunity -- of course, they can proceed against -- I'm sorry.
19 *Lathrop vs. Deal*, 301 Ga. 408. You can proceed against
20 individuals. There is official capacity limitations with
21 sovereign immunity. But there are remedies that can be pursued
22 through state court that are available to them.

23 THE COURT: I have asked both of plaintiffs' counsel
24 to address the ripeness issues. I want to give the state an
25 opportunity as well.

1 MR. TYSON: Yes, Your Honor. I'll touch briefly on a
2 few of those points because I think it is important to
3 recognize the difference in the claims about ballot marking
4 devices from the claims about DREs.

5 With DREs, you had the history that you have
6 identified that went along with that. With ballot marking
7 devices, you have a paper ballot system that generates paper
8 ballots and is auditable. Mr. Cross identified problems with
9 bar codes. The problem is Dr. Halderman in his declaration
10 with the preliminary injunction identified optical scan units
11 can also be affected from a programming standpoint.

12 So when a voter places a hand marked paper ballot
13 into an optical scanner, it still is a computer reading the
14 information on the voter's ballot. So ultimately that is why
15 we do audits. We do audits because we want to be sure that the
16 electronics are doing what the paper says is happening.

17 So from a ripeness perspective, we do think that
18 there is an issue with that. A concern in terms of we haven't
19 fully implemented the system yet. There is not a full
20 background. And if the sole claim is bar code -- the use of
21 bar codes is unconstitutional, then that may be the one area
22 where you could find something is ripe as a legal matter. But
23 that then is a sweeping case that would have nationwide
24 implications about the use of ballot marking devices.

25 I also wanted to correct one other component of what

1 Mr. Cross said that there was a vendor who bid that did not use
2 bar codes. That is not correct. Hart chose not to put a bid
3 in. They were a vendor that has a non-bar code ballot marking
4 device system. All of the systems from my understanding that
5 did were bar code-based ballot marking devices.

6 THE COURT: So are you raising the jurisdictional
7 argument as a -- on a facial basis or a factual basis or both?

8 MR. TYSON: I'm sorry. Could you repeat the
9 question.

10 THE COURT: Are you raising your jurisdictional
11 objections on a facial or factual basis or both?

12 MR. TYSON: On both, Your Honor. We believe that
13 there is a failure to state a claim as it relates to the
14 specific type of claim that the plaintiffs are bringing. The
15 factual basis that is included is the public record items. We
16 specifically did not attach a declaration. We weren't trying
17 to make this a motion for summary judgment or a PI.

18 We wanted to address this from the information in the
19 public record, which as we noted in our reply, the Court is
20 able to consider. And it is important to understand the
21 contours of the claim because of how different this claim is
22 from the DREs.

23 With the DREs, the allegation was you have a system
24 that had a record of issues. It was old. There were a number
25 of problems with it. And there was no way to determine from an

1 auditing standpoint whether or not those problems affected
2 elections.

3 That is not -- I'm not saying that was correct. I'm
4 saying that is a summary of the plaintiffs' claims.

5 In the ballot marking device claims, now you have a
6 claim where a system can be used. It generates a paper record
7 that is auditable. That is a completely different kind of
8 claim. And some of the information in our brief was to help
9 inform the Court about the differences in those claims. But it
10 is both facial and factual.

11 THE COURT: So when you say it is auditable, maybe
12 you could help clarify for me exactly how it is auditable, what
13 you are thinking is the audit plan, because you must have made
14 progress on that by now.

15 MR. TYSON: Yes, Your Honor. So --

16 THE COURT: And I didn't ask for any of the
17 regulations or proposed regulations to be submitted to me at
18 this juncture. But give me an idea of what you are saying.

19 MR. TYSON: Yes, Your Honor. So the National Academy
20 of Sciences and the other literature about ballot marking
21 devices recommends audits of the human readable portion.

22 In the City of Cartersville elections in November,
23 the Secretary of State staff conducted a series of various
24 types of pilot audits. There were a number of different ways
25 you can conduct an audit. And I don't profess to have the

1 technical knowledge of what all of those are.

2 But several types of audits were used along with
3 verified voting and some other third-party organizations that
4 are interested in election integrity to try to begin developing
5 the audit procedures for the state. Those results have all
6 been brought back, and there is a working group from the State
7 Election Board that is currently in the process of working on
8 rules related to the implementation of ballot marking devices
9 and developing an audit plan that then can be used on a going
10 forward basis.

11 That will likely be phased. It probably is not going
12 to be jumping to full risk-limiting audits right off the bat as
13 very few states do that on a statewide basis. But there will
14 be a process whereby we begin to ramp up the auditing capacity.
15 And by statute, we must audit as soon as the November 2020
16 election. I believe the expectation is that there will be
17 audits of the elections prior to that as well.

18 THE COURT: But are you -- the most basic question
19 is: Are you -- is it the state's view that each ballot itself
20 is verifiable, or is it the total for the precinct is versus
21 the count on the -- from the paper ballots for that precinct?

22 MR. TYSON: So every ballot can be verified by that
23 voter. They can look at it and see what the selection is.

24 THE COURT: I understand that. But they can't
25 obviously verify the bar code. So the question is: When you

1 are looking at the vote of Precinct 5, are you able to -- you
2 don't have a computer that the person put their vote on. So
3 you can't basically compare the vote -- the paper ballot to
4 something that was conceivably relatable to that individual.
5 So you are looking at the total number of, let's say, votes for
6 John Jones that were cast versus Amy Jones on the paper ballots
7 and you are looking and comparing that to the total number
8 counted by the bar code?

9 MR. TYSON: Yes, Your Honor. And one of the auditing
10 methods includes putting each paper ballot onto a screen and
11 what is the computer reading. We can see what the human
12 readable portion reads, what that matches up to.

13 THE COURT: Well, that is what I was trying to find
14 out.

15 MR. TYSON: Yes.

16 THE COURT: But if you put up on the screen the
17 individual choices of the voter, aren't those -- shouldn't we
18 expect those to be whatever the bar code says it is?

19 MR. TYSON: Yes, Your Honor, we should.

20 THE COURT: So is that in its own way sort of
21 automatically self-verifying? Because I realize that a lot of
22 what the plaintiffs say is people simply don't -- are not able
23 to carefully examine all of their votes. So maybe they are
24 able to absolutely verify, yes, I meant to vote for Donald
25 Trump for President. But they are not going to go down to the

1 lower end of the ballot and be able to verify that.

2 They don't do that? They don't remember the names?
3 I don't remember the names half the time.

4 MR. TYSON: Your Honor, the problem with that is
5 there is not yet at this point peer-reviewed evidence of what
6 that rate is in terms of how voters verify their ballots. So
7 the kind of theory that the plaintiffs engage in is if voters
8 don't verify their ballots, which is a third-party taking
9 action, then it might not be possible to uncover a programming
10 error if the audits also did not uncover that programming
11 error.

12 So there's several layers of speculation. And that
13 gets into our brief of *Clapper* in terms of what we're dealing
14 with of how speculative the potential harm is here. It has to
15 assume that every voter fails to verify or that only the ones
16 in a particular place don't, that the audits don't turn up
17 anything unusual, that no programming errors emerge otherwise.

18 It is the chain of speculation to get to that point
19 because we do now have a piece of paper unlike the situation
20 with the DREs. And I think it is --

21 THE COURT: But let me just interrupt you. So the
22 state's notion in terms of -- one notion at least in terms of
23 auditing is you put up the screen -- on the screen what the
24 individual has actually -- it looks like that they picked,
25 subject to some debate but anyway -- and then -- then you'll be

1 able to scan the bar code on another screen and see is it the
2 same?

3 MR. TYSON: Yes. Another method is a hand count of a
4 select number of ballots. We hand count what the human
5 readable portion says, and then we run that group through a
6 scanner and see if the results match up. Those are the kinds
7 of things that can be done to verify those issues.

8 I think it is important to recognize though that the
9 programming issues with the hand marked paper ballots when you
10 have voters you have questions of voter intent. On a hand
11 marked paper ballot, that can also lead to additional problems.

12 THE COURT: Well, I'm not comparing anything at this
13 point. I'm out of the world of comparing. I'm just looking at
14 what is happening in this system.

15 MR. TYSON: Yes.

16 THE COURT: And what are you doing -- what is the
17 pre-vote -- election verification process options?

18 MR. TYSON: Yes, Your Honor. So there is a similar
19 logic and accuracy testing that can happen in terms of you can
20 generate out a set of test ballots. This is the process that
21 would happen. You can run those through the scanner, ensure
22 the results, the programming is what you expect it to be.

23 The other advantage of a ballot marking device system
24 is, unlike a DRE system, you have the ability to come into a
25 particular precinct at random in the middle of election day,

1 generate a stack of test ballots that you can then use to
2 further check the programming along the way there.

3 So those are all the things that are being considered
4 in terms of the design. And the December 17 State Election
5 Board meeting will have a number of these. I don't think it
6 will have a final audit rule at that meeting. But the intent
7 is to get to the December 17 meeting a number of the ballot
8 marking device rules being put in place.

9 THE COURT: Is the intent to audit more, whether it
10 is preelection or postelection, than what was done in the past?
11 Because it was a very small sample. I mean the tiniest of
12 samples done beforehand.

13 MR. TYSON: Yes, Your Honor. You are referring to
14 the parallel testing that was done previously?

15 THE COURT: Yes.

16 MR. TYSON: Yes. I don't know for sure. I don't
17 want to speculate on the state's plans on that point. But I
18 know the state is aware of the need for a look at those types
19 of issues on a broader scale with the ballot marking device
20 system.

21 THE COURT: Let me ask you this question, which I did
22 before but I'm just going to return to in different form.

23 Let's say I were to determine that the claims are
24 premature that are raised here and dismiss without prejudice.
25 What does that -- where does that put us relative to the DRE

1 claims, the injunction I have already issued, the very long
2 order I have already issued?

3 If you are going -- if you are thinking -- and I
4 tried to pin you down before, but I'm still trying to pin you
5 down about this.

6 Where does that leave us in terms of: Are you
7 agreeing to a judgment based on that, or are you -- and that
8 you may or may not appeal or -- because if you may appeal it,
9 then, of course, the plaintiffs may want more -- they might, in
10 fact, then want to pursue some of this DRE discovery to do
11 still more to prove that things got hacked, that there was more
12 misconduct in the handling of the DREs, and et cetera, which
13 might not be of a great value of time and resources for anyone,
14 much less money.

15 But to preserve their position, they might indeed
16 want to do that. So where does this leave -- so I want to
17 return again to what if we're just stripped down back in this
18 case to the original claims and they have to start again at
19 some later point with their BMD claims.

20 MR. TYSON: Yes, Your Honor. I think a couple of
21 things. Number 1, if you found that the BMD claims were not
22 ripe and they are not going to come in at this point, then
23 we're left with the situation where the remaining claims are
24 moot.

25 Under House Bill 316 and OCGA 21-2-300(a)(2), the

1 state elections -- once we have the new system certified, the
2 state elections shall be conducted with the use of scanning
3 ballots marked by electronic ballot markers.

4 So state law at this point would then and your
5 injunction already has made this case moot now going forward.
6 So I think that the proper procedural posture would be a
7 dismissal of claims, the DRE claims, as moot. And that would
8 be the conclusion of this case.

9 Mr. Russo may have something he wants to add on that
10 point.

11 MR. RUSSO: I will just add that, Your Honor, we have
12 asked about preservation of the machines and recycling of the
13 machines under the statewide contract that Georgia has for all
14 computer equipment. I mean, once the machines are recycled,
15 there is no -- the machines aren't going to be used again in
16 the State of Georgia.

17 The harm is not capable of being repeated in the
18 future because the state will not have the machines. As the
19 plaintiffs have noted throughout this case, these machines --
20 you can't go buy new DRE machines. They are not on the market.
21 So the state is not going to be able to move back to DREs in
22 addition to the fact that the Secretary of State will decertify
23 the machines. And under state law, you cannot use decertified
24 machines. The counties can only use certified machines. So --

25 THE COURT: All right. So you are saying it is moot,

1 and therefore there is no appeal?

2 MR. TYSON: Yes.

3 THE COURT: Is that right?

4 MR. BROWN: I didn't hear an answer.

5 MR. RUSSO: What was your question?

6 THE COURT: I said: If it is moot, then there is no
7 appeal?

8 MR. RUSSO: That is correct, Your Honor.

9 MR. TYSON: Yes.

10 THE COURT: So when the state referred to third
11 parties in its brief at Page 28 of, I think it is, 645, you
12 were referring to individuals or you were referring to hackers,
13 whether they be foreign countries or individuals, that the
14 state couldn't be responsible for?

15 MR. TYSON: Your Honor, I believe in that portion of
16 the brief as far as the traceability goes, that because there
17 is independent actions, i.e., both voters would have to fail to
18 verify their ballots and then it would require the actions of
19 third parties who would try to come in and compromise that, I
20 believe that is referring to both -- the interference obviously
21 is referring to outside actors and the redressability point.

22 But on the traceability point, I believe that portion
23 was referring to voters' actions, that there is no showing that
24 at this point we have voters failing to verify. That is an
25 independent action that would be necessary for plaintiffs to

1 have standing.

2 THE COURT: I think that is what I wanted to cover as
3 to the motion to dismiss. I know that there was in addition
4 that the plaintiffs wanted me to identify what the schedule
5 would be for a motion -- hearing a motion for preliminary
6 injunction.

7 I'm just somewhat concerned that it puts the cart
8 before the horse. I mean, I think that the issues are real.
9 But I'm happy to hear from counsel. You are standing up.

10 MS. KAISER: Yes, Your Honor.

11 THE COURT: Would you introduce yourself again.

12 MS. KAISER: Yes, Your Honor. I am Mary Kaiser with
13 Morrison Foerster on behalf of the Curling plaintiffs.

14 Just briefly, Your Honor, we --

15 THE COURT: Could you pull the microphone a little
16 closer to you or stand in front of it. Thank you.

17 MS. KAISER: Sure. We just want to make a few points
18 in rebuttal to the defendants.

19 THE COURT: All right. Go ahead.

20 MS. KAISER: With respect to mootness, under the
21 mootness doctrine, it is not enough for the defendants to just
22 say we're not going to do this again. If the claims were
23 dismissed -- if the DRE-related claims were dismissed as moot,
24 there would be a question as to whether Your Honor's relief
25 granted in the preliminary injunction is defunct. And at that

1 point, it would just kind of open this whole can of worms back
2 up again.

3 The defendants do have the DRE machines. It is not a
4 question of whether they can go out and buy them again. They
5 have them. And they could reverse course and decide to use
6 DREs again if the claims are just dismissed as moot at this
7 point.

8 With respect to Your Honor's questions regarding
9 ripeness, I think one thing to keep in mind is just in terms of
10 the bar codes what else we could learn, what else would we
11 learn in the March primary elections with respect to bar
12 code-based BMDs in terms of voter verification.

13 I think it is undisputed and we know at this point
14 that voters will not be able to verify the bar code portion of
15 the ballot that would be scanned by the optical scanners. We
16 don't need to go through a primary vote to know that that is
17 the case.

18 And I think for, Your Honor, we would just like to
19 draw one metaphor.

20 THE COURT: Just one moment.

21 **(There was a brief pause in the proceedings.)**

22 THE COURT: Okay. Go ahead.

23 MS. KAISER: If the state were to build a bridge and
24 there were questions about the fundamental safety and
25 structural reliability of that bridge, we wouldn't tell drivers

1 to go out and drive over the bridge and see what happens. We
2 would say, okay, let's stop. Let's pause here. Let's test the
3 structural reliability of this bridge before we put -- put
4 individuals in danger.

5 We think there is a metaphor to be drawn here, Your
6 Honor. Whereas, we're not talking about physical harm. But we
7 know that there is a structural unreliability problem with this
8 BMD-based system. And so we don't see the point of forcing
9 voters to go through an election using such a system when we
10 know that there is a real constitutional threat to their
11 fundamental right to vote.

12 THE COURT: Well, how would you suggest that I
13 address the mootness problem you pose in terms of if I've --
14 they contend that it was moot but there is actual relief and
15 there are actual findings that might bear relevance to the
16 future is it really moot? Because there was a lot of findings
17 as to the management of the voter database and of the data
18 systems, which conceivably are relevant.

19 MS. KAISER: Yes, Your Honor. I mean, we obviously
20 do not think that these claims are moot. We think that there
21 are aspects of the old system that will continue into the new
22 system. And that is something that we should -- we're entitled
23 to discovery on.

24 And, you know, with respect to the DRE system itself,
25 there needs to be permanent relief here. There needs to be a

1 permanent solution. And if they are unwilling to stipulate to
2 that and to agree to convert Your Honor's preliminary
3 injunction into a permanent injunction, then I think we do have
4 to go forward with a hearing and address these claims on the
5 merits.

6 THE COURT: The DRE claims?

7 MS. KAISER: Yes, Your Honor.

8 THE COURT: But even though they are not proceeding
9 with the DRE system and even though I have already -- I realize
10 any ruling I have is subject to revision until it is a final
11 judgment. But even though they are not proceeding with the
12 DREs?

13 MS. KAISER: Yes, Your Honor. I mean, at the end of
14 the day, this is --

15 THE COURT: We decommission your bridge, and then we
16 say we still need to have a -- proceed with litigation about it
17 even though we know -- I understand you are saying they build
18 bad bridges.

19 MS. KAISER: I mean, Your Honor, we obviously think
20 that the better use of the Court's time and resources is to
21 just convert the preliminary injunction into a permanent one.
22 However, if the defendants are unwilling to agree to that, then
23 we do think that we would need to move forward on those claims
24 and resolve them permanently.

25 THE COURT: All right. Thank you.

1 MS. KAISER: Thank you, Your Honor.

2 THE COURT: Well, as to the DRE GEMS voting
3 equipment, at least as an initial matter, it sounds like there
4 is a pragmatic solution that can be negotiated between the
5 parties at least so that you aren't having to store thousands
6 of machines. I'm reluctant to say exactly how many. And
7 clearly all the state's own server equipment and related
8 machines should be kept and so should any equipment given to
9 contractors or that they are using.

10 But I think that the plaintiffs need to talk with
11 your experts and think about what -- what you actually are
12 asking to be kept, whether it is -- and whether it is based on
13 particular counties or it is actually -- are you really asking
14 for it to be representative of the state.

15 But either way, I would encourage you to think very
16 much also in light of the expense and what you really
17 realistically might need rather than the maximum because it
18 really -- I don't know that it would make a difference.

19 And I think that the state agreed with they would be
20 hard-pressed later on to say, oh, that sample or that group is
21 not representative or doesn't -- is not helpful.

22 And maybe it is a particular county issue that you
23 want to zone in on instead. So I mean, the state did provide
24 some reasonable explanations of one or two of the examples you
25 provided before where things had gone astray. And so -- and

1 that doesn't mean that those were the only data issues with
2 those counties. But those were the particular ones that you
3 flagged. By you, I mean the plaintiffs.

4 So I think that I respect the fact that the
5 plaintiffs don't want to be boxed in and the defendants haven't
6 let themselves be boxed in about what is going to happen
7 either. So -- but given the status of where things are going
8 forward, I would -- if everyone is really worried that they are
9 going to reignite the system, then decommissioning and disposal
10 of two-thirds of the machines seems to suggest otherwise.

11 MR. TYSON: Your Honor, on that point, I just wanted
12 to emphasize that time is of the essence for the state at this
13 point. I mean, we're now over 20,000 ballot marking devices
14 that have been acceptance tested and are ready to be deployed
15 to counties.

16 THE COURT: And you don't have room -- they don't
17 have room --

18 MR. TYSON: The sooner we can -- and we are doing the
19 change. So the sooner we can have some direction on that the
20 better.

21 MR. CROSS: Your Honor, could I ask just a quick
22 question.

23 THE COURT: Yes.

24 MR. CROSS: I mean, if the state is serious about
25 decommissioning and as you pointed out if they are going to

1 destroy the machines and not use them, why can't we consent to
2 a judgment here?

3 THE COURT: Well, that is what I'm getting back to.

4 MR. CROSS: I'm struggling with understanding why we
5 are having this. Why don't we just consent to a judgment and
6 we are done with this? We have never gotten an answer to that.

7 MR. TYSON: And, Your Honor, the simple answer is the
8 case is moot. There is no more jurisdiction to this Court to
9 enter a judgment under the state's position in this case. So
10 that is where we are from a jurisdictional perspective at this
11 point.

12 THE COURT: What, on the other hand, if the -- I know
13 you have brought the BMDs in. But at minimum, you know, I have
14 an order in there saying, listen, if the whole thing doesn't
15 work, what is your fallback plan. And I have an order in there
16 saying that you then need to have the hand backed up -- hand
17 marked backup voting system as a backup.

18 And so that seems to me still relevant because that
19 was the second part of the order is simply you've got to have a
20 backup under these circumstances. And where you have also
21 engaged in -- because of the prior years of delay having to be
22 basically the largest rollout that anyone has done all at once
23 in such a compressed time period.

24 So I'm not sure that the relief that I ordered is
25 moot under the circumstances. So I understand why you are

1 saying it is moot. But I would perhaps beg to differ. But it
2 doesn't mean that you couldn't craft a judgment that you would
3 all agree on alternatively and clean this up.

4 MR. TYSON: Well, Your Honor, I think it is important
5 to remember the State Election Board, like I mentioned, is
6 working on the rules now. At the December 17 hearing, I think
7 we're planning to have the rules that will lay out all the
8 backup planning that happens. Under current law, if DREs go
9 down, people start voting on provisional ballots. It happened
10 in the 2018 elections in a couple of Gwinnett precincts.

11 We expect a similar process would be used if the
12 ballot marking devices were down or not functional. So, again,
13 I think the key is the legislature changed the law under
14 300(a)(2). Now that those machines are implemented and
15 certified, we cannot go back. And in the Eleventh Circuit, a
16 Government cessation of activity is entitled to a presumption
17 that we're not going to return to that.

18 MR. CROSS: Your Honor, again, that ignores the
19 critical point you have made. A component of the relief that
20 we sought and obtained is a default of hand marked paper
21 ballots. If the claims are dismissed as moot, that is all out.
22 They can do whatever they want come March and come November of
23 next year. In terms of if the system goes down or if they
24 can't implement it, what do they go to? So that has got to
25 survive.

1 I understand that may be why they don't want to work
2 out a consent judgment. But that has got to survive. That is
3 actually a win on the merits of this case is they would
4 implicitly concede since they won't -- they say the claims have
5 been resolved. Then fine.

6 I guess the bottom line I'll say, Your Honor, just
7 enter a judgment. They have said no more discovery is needed.
8 Your Honor doesn't need anything else to resolve our DRE
9 claims. They are on record with that position. They have said
10 you don't need a trial. You don't need a hearing. Okay. Then
11 in your court, Your Honor has everything you need to take your
12 existing order and turn it into a final judgment. And that is
13 what we would say. That is what they are inviting. That would
14 be the proper outcome on those claims, Your Honor.

15 THE COURT: What is your response?

16 MR. TYSON: Your Honor, with the -- there is no
17 chance we're going to return to DREs. We are trying to get rid
18 of these units. So the fact that there is a backup system will
19 be -- if the ballot marking devices are not fully deployed,
20 then yes, paper ballots that are hand marked would likely be
21 the backup system.

22 The State Election Board will clarify that rule in
23 the next couple of weeks here. But it is not as if we are
24 going to be able to return to a DRE system. That is why the
25 claims are moot because the legislature has brought us to this

1 point and the Secretary has implemented that by removing the
2 DREs, which was the subject of the complaint.

3 Choosing a different paper ballot system is not the
4 claim. What Mr. Cross is talking about appears to be related
5 to the ballot marking device claims. That if the ballot
6 marking devices are employed or deployed fully, there will be
7 issues. But the DREs as to the claim that those are an
8 unconstitutional election system, we're not going back to
9 those. Those claims are all moot at this point.

10 MR. CROSS: Your Honor, that is not quite right. The
11 hand marked paper ballot fallback was with the DRE claims.
12 Your Honor will recall we got that order before we ever
13 asserted BMD claims because their position at the time was that
14 BMD-related claims weren't ripe.

15 There is a lot of other stuff. The hand marked paper
16 ballot is part of it. Your Honor wrote a very comprehensive,
17 as you noted, opinion that has lots of requirements in it
18 beyond just the hand marked paper ballots. Those have to
19 survive.

20 We litigated that. We won on those issues. So to
21 say it is moot, that all disappears. That is not appropriate.
22 We are way beyond mootness at this. We litigated it. We won.

23 They have two paths forward. They can consent to a
24 judgment, or they can continue to insist that these are somehow
25 live claims and they have to get resolved. But if they are

1 going to say no discovery is needed, Your Honor has it. Just
2 enter a judgment.

3 His response is not answering your question. He's
4 just repeating himself. They have one of two paths. And
5 mootness is not at play.

6 MR. TYSON: Your Honor, the existing code provides
7 for provisional ballots. When the electronic machines are not
8 working, a provisional ballot is a hand marked paper ballot.
9 So with the DREs gone, there is no other path forward for the
10 state under the existing statutes that govern elections in the
11 State of Georgia.

12 MR. CROSS: I'm glad he said that. But this gives
13 you a sense of the shifting positions. Remember in 2018 when
14 we were in front of you on DREs, Your Honor, that was a key
15 part of our argument to this Court was that the existing
16 statute said if DRE is unreliable you go to hand marked paper
17 ballots. That is the provisional.

18 They disputed that. They said we were misreading the
19 law, that that was not required. So it is just -- they are
20 going to take whatever position they want in the moment. And
21 the most he says today is that hand marked paper ballots
22 likely -- his word likely -- would be the backup if they have
23 an issue with the BMDs.

24 It is not likely. Your Honor has ordered it. So I
25 don't want to keep beating this horse. But they want to escape

1 a judgment. I get they don't like the concept of a judgment.
2 But they have either got to consent to it or let Your Honor
3 rule on the existing record, which they have told Your Honor
4 time and again is a closed record.

5 And we know how that comes out because you have ruled
6 on it before. And they have suggested nothing to get to a
7 different outcome.

8 MR. TYSON: Your Honor, just briefly --

9 THE COURT: Mr. Tyson, I mean provisionals have their
10 own hoops and are not -- it is not the same as casting a
11 regular vote.

12 MR. TYSON: Except for the situation when the
13 electronic machines are not functioning. And so we ran into
14 this issue in Gwinnett County in 2018. There were machines
15 that went down. Voters were given provisional ballots. They
16 voted those ballots. They were given a letter of instruction
17 saying you must take some action to ensure your vote is
18 counted.

19 A judge in Gwinnett County, superior court judge,
20 ordered the letter be changed in the middle of the day because
21 that was not a correct statement of the law. The correct
22 statement of a provisional ballot that is cast when the
23 machines are down is it is counted, period.

24 What Mr. Cross is talking about is the idea that you
25 could just move to paper ballots sua sponte -- a jurisdiction

1 could do that. The statute says when the electronic is not
2 available then you vote provisional ballots.

3 The same thing would apply in this situation. If the
4 ballot marking devices, which are required under 300(a)(2) are
5 available, people would vote a hand marked paper ballot that
6 would then be counted without any further action by the
7 elector, which, again, is why from where we sit here there is
8 no longer jurisdiction to address these issues. They are --
9 they will be addressed consistent with how this Court has ruled
10 but under the statutory structure of the State of Georgia.

11 THE COURT: That is your plan? That is the fallback
12 plan?

13 MR. TYSON: Yes, Your Honor.

14 THE COURT: But the state has to adopt it you said?
15 There was sort of -- I understand what the code provided. I
16 understood that then. But though I thought, frankly, back then
17 no one was saying that they would do that.

18 But you are saying that is what the State Election
19 Board is prepared to now adopt?

20 MR. TYSON: Let me give two pieces to that.
21 Number 1, existing law is already if your electronic things are
22 not functioning -- it is not like you can just throw them away
23 and say we are going to vote hand marked paper ballots. But if
24 your electronic units are not functioning, you vote
25 provisionals.

1 What the State Election Board -- that is the statute.
2 That has been the statute. That will be the statute going
3 forward. What the State Election Board is doing for the
4 December 17 meeting is setting out the parameters for how many
5 emergency backup ballots do you need to have in a particular
6 jurisdiction in the event that a ballot marking device goes
7 down. And those will be hand marked paper ballots.

8 So those are the rules that will be put in place
9 fleshing out the statutory structure. But if the electronic
10 machines do not work, that is how voters will vote, on those
11 hand marked ballots.

12 THE COURT: So who determines when the electronic
13 system is not working? Does it have to be an utter failure
14 systemwide or precinctwide or does it -- what if some of the
15 machines work and some of them don't, which is more of what we
16 have lived through in more recent years?

17 MR. TYSON: Yes, Your Honor. It is the backup plan.
18 If the machines are not working or --

19 THE COURT: If all of them are not working?

20 MR. TYSON: Correct. Yes. In a precinct, yes. At a
21 precinct if they are not working --

22 THE COURT: So the whole precinct has to be down?
23 Not just some of the machines?

24 MR. TYSON: Correct, Your Honor.

25 MR. BROWN: To answer your question as to who

1 decides, under your order our position is you decide. This is
2 a part of your remedy. And that is not mooted.

3 THE COURT: Well, I was asking for purposes of the --
4 what they were -- under their system. Not whatever the Court
5 provided.

6 MR. TYSON: Yes, Your Honor. Your order was if the
7 rollout doesn't occur, if something goes wrong with that.

8 THE COURT: If something goes fatally wrong with it
9 but doesn't -- it might occur and some portions of it may not,
10 in fact, successfully.

11 So I just want to get the election code here. And we
12 just want to make sure. I mean, the code -- old code section
13 referred to provisionals. It didn't refer to hand marked
14 ballots. That is what you are talking about that you -- tell
15 me again the provision.

16 MR. TYSON: I'm sorry, Your Honor. Let me see if I
17 can find the exact code provision. But a provisional ballot
18 under the Georgia code is a hand marked paper ballot. There is
19 no other way.

20 There are some methods of technology where you could
21 generate a provisional ballot through electronic means. But in
22 Georgia, a provisional ballot is a hand marked paper ballot.

23 THE COURT: If one of you will go look.

24 I guess I'm just asking you is that the code
25 section -- at least the old one -- said that the remedy --

1 doesn't say the remedy is a provisional ballot. It just says a
2 hand marked paper ballot.

3 So just tell me how I translate that into a
4 provisional ballot.

5 MR. TYSON: Yes, Your Honor. Maybe if I could file
6 something -- a letter brief after this. I think we're looking
7 in the statute. I'm not sure we're finding it right offhand.

8 THE COURT: I'm sorry. You can go ahead and file a
9 letter brief. That is fine.

10 The other items that I think were a lot of the
11 Coalition's concerns -- the Coalition plaintiffs wanted me to
12 reconsider about the paper pollbook backups at each precinct.
13 I mean, all of the items that I identified under Items 1 and 2
14 for the agenda at Document 671. But it is really Number 1
15 because we've discussed the question of the BMD preliminary
16 injunction.

17 MR. BROWN: Yes, Your Honor. On the paper copies of
18 the e-pollbooks, that is an issue that has become even more
19 imperative recently with the -- the pilots show the
20 difficulties that the state was having with the new pollbooks
21 throughout. It was a large-scale problem.

22 But even without those problems, our position is that
23 the sort of universally accepted best practice is to have paper
24 copies of the pollbooks. Not of the voter registration
25 database but of the pollbooks in each polling place.

1 THE COURT: The pollbook for that precinct?

2 MR. BROWN: For that precinct. And there is really
3 no reason not to do that. It is probably --

4 THE COURT: Precinct is not always identical to the
5 polling place. I mean, you could have a precinct that
6 encompasses multiple --

7 MR. BROWN: That is correct.

8 THE COURT: -- polling locations.

9 So you want the entire precinct?

10 MR. BROWN: I believe our proposed modification to
11 the order in our Rule 59(e) has the wording the way -- that is
12 very precise about a polling place. And I believe we say the
13 polling place needs to have the e-pollbooks for the entire
14 precinct.

15 MS. MARKS: All the precincts in the polling place.

16 MR. BROWN: All the precincts in the polling place.
17 I got the thing reversed.

18 And all of the experts from --

19 THE COURT: This is because you are saying the
20 pollbooks were -- basically are not -- the software is not
21 always working in terms of checking in?

22 MR. BROWN: Right. It could be just because of
23 communication issues. These new ones operate on WiFi and
24 Bluetooth, which is a whole host of other security issues. But
25 even if it is nothing serious, if there is a problem, it can

1 really stop voting in its tracks and has in the past.

2 And so what --

3 THE COURT: They are different machines. I realize
4 they are using some of the same data. Some of the same -- they
5 are inheriting some of the same software.

6 MR. BROWN: Right. And it probably -- it is
7 different. And all indications are it is worse than the others
8 because they are just -- they are still getting the bugs out.

9 So there is really no reason not to have paper copies
10 of the pollbooks. It is no more difficult than the literal
11 remedy that Your Honor ordered in Document 579.

12 THE COURT: What is the problem with that? I mean,
13 maybe -- why wouldn't -- just as a matter of ease in
14 facilitating voter access and rationality in the voting
15 process, putting aside any kind of positional argument, why
16 wouldn't the state just do that?

17 MR. BELINFANTE: Your Honor, I'm going to defer to
18 Mr. Russo on that. I have got to get to the State Capitol for
19 a swearing in ceremony for a judge where I'm speaking.

20 THE COURT: Well, you have got to get there then.

21 MR. BELINFANTE: I didn't want you to think that I
22 was being rude or anything of that nature. So thank you, Your
23 Honor. May I be excused?

24 THE COURT: Thank you. Who are you speaking on
25 behalf of?

1 MR. BELINFANTE: One of our former colleagues,
2 Kimberly Anderson, is being sworn in to the State Court of
3 Dekalb County today.

4 THE COURT: Great.

5 MR. BELINFANTE: Yes. Thank you, Judge.

6 MR. RUSSO: Your Honor, the state already provides a
7 paper pollbook backup in each precinct. And Mr. Harvey had
8 that in his declaration at 616-1, which is Paragraph 23 of that
9 declaration. And state law, Your Honor, also provides that the
10 registrars place in the possession of the managers in each
11 precinct one copy of the certified electors list for that
12 precinct.

13 I'm not entirely sure if we're just talking past each
14 other or what because Mr. Brown referred to the pollbook. The
15 electors list is the -- it is the voter registration list.
16 That is the information that is in the pollbook. It is all
17 pulled from eNet.

18 So the information that is printed in the paper --
19 paper pollbooks is the same information that goes into the
20 electronic pollbooks. But I mean, I'm just not sure --

21 MR. BROWN: The difference is that what we're asking
22 for is updated pollbooks. What happens now is that if, for
23 example, Mr. Ichter goes in to vote and they don't have his
24 name up, they don't -- and it doesn't work or the pollbook
25 mechanism doesn't work and there is no way to tell --

1 THE COURT: It is because, for instance, they think
2 he voted already?

3 MR. BROWN: He already voted. And he's trying to
4 vote again. So they will not use what the paper pollbook --
5 the paper that they have to actually adjudicate whether or not
6 he can vote or not.

7 That is the problem. And if you multiply that times
8 the number of different permutations or problems you are going
9 to have, that is why our relief is so simple and so necessary.

10 THE COURT: What is the date when they produce the
11 pollbook for each precinct? What is the -- because that is the
12 most obvious issue is that you have -- if they are doing it way
13 in advance, it will basically reflect different data
14 potentially than if it was produced --

15 MR. RUSSO: It says that -- the statute refers to at
16 least prior -- prior to the hour appointed for opening of the
17 polls. So at least one hour before.

18 THE COURT: Well, I would encourage you-all to talk
19 about it. Because my experience is that you can't vote after
20 Friday of -- you can't do early voting after Friday. So you
21 have got Monday to produce these when you know -- when the
22 database shows who has actually voted, who can legitimately
23 come in and cast a vote.

24 I mean, I -- I would encourage you to do that.
25 But -- and it might make for a smoother operation that would

1 yield -- be to your benefit and the counties' and the voters'
2 benefits.

3 Why don't we move -- I would strongly encourage you
4 to do that. Because there is a lot of frustration obviously in
5 the check-in process. And it could only benefit the state in
6 my mind.

7 But I will just say relative to many of the things,
8 Mr. Brown, that your client wants me to do is I have -- it is
9 true that I have tried not to get into the weeds. I have been
10 a special master monitoring institutions. I understand what
11 that involves.

12 But, you know -- and I know that Cuyahoga County
13 ultimately in Ohio had to have someone basically doing that.
14 But that is not where I'm at. So, you know, I try to make
15 clear what I think has gone wrong at times on a very weed basis
16 because I am ever hopeful that somebody might pay attention.

17 But -- all right. What else do you want to zone in
18 on? I know you were concerned about the audit process. We
19 have talked some about that. But I'm not going to have a
20 hearing on auditing beyond what I have today. I may ask for
21 some information if I still am maintaining the case.

22 MR. BROWN: Your Honor, we would -- depending on some
23 of the other things that are happening, we would want to just
24 advance the idea that there may be a point in time where we
25 should approach Your Honor about the state's actual readiness

1 to deploy the BMDs. I'm not talking about the motion for
2 preliminary injunction. I'm talking about the old relief.

3 But our information is much more alarming about the
4 readiness than the state has presented. That is not in front
5 of you today. But there may be a moment where Your Honor does
6 need to make a decision as to whether or not the default plan
7 needs to be the plan so that the state can start executing that
8 by printing paper ballots. And so we may be approaching Your
9 Honor not immediately but in the near future with some sort of
10 proposal so that decision can be made.

11 THE COURT: So what do you mean by in the near
12 future, and what are the nature of the issues?

13 MR. BROWN: The nature of the issues --

14 THE COURT: Because what I know is only what I read
15 in the newspaper.

16 MR. BROWN: Well, the nature of the issues is whether
17 or not Your Honor in your ruling in 579 said, given the
18 challenges of the implementation, you need to have a default
19 plan ready to go in case the implementation goes haywire. That
20 is, I think, a fair summary of that.

21 That is -- that was obviously the correct ruling and
22 stands. And -- but the next question is when -- when does that
23 decision actually get executed as to which is used. Because to
24 fulfill your order is not just simply to have a default plan
25 but to use it if it is necessary.

1 So to determine whether it is necessary, we need much
2 more visibility into what the state is doing. Part of what we
3 asked for in our motion for the conference was to get better
4 information from the state.

5 We will be conducting discovery on -- sort of
6 post-judgment discovery that we think will give us more
7 information. So we hope to be able to come to the Court
8 probably within several weeks with some better understanding of
9 exactly how ready the state is to use the BMDs, apart from the
10 constitutionality, entirely separate issue, but whether or not
11 they will be ready to do that.

12 And we believe that is consistent with post-judgment
13 discovery and do not -- we are very mindful, Your Honor, as to
14 what you just said about the role of a federal court in this
15 process and to keep it at the larger issues that you have
16 focused on in your order and to not get into the weeds of the
17 administration of the election but simply the big choices that
18 the state needs to be ready for so that the March primaries --
19 so that the state is ready for the March primaries. And so
20 that would be the other issue that we would anticipate raising
21 with you.

22 We have already --

23 THE COURT: Does the state anticipate giving a
24 presentation to the -- that there will be a presentation at the
25 next state board meeting regarding any of these issues?

1 MR. TYSON: Yes, Your Honor. I believe that at the
2 December 17 State Election Board meeting there is going to be
3 the rules that will govern the backup plan for what happens if
4 there is not a complete rollout in time. So this may address
5 itself through that process. And I believe those issues will
6 be addressed by the State Election Board.

7 Obviously, as you collect the DREs, you have got to
8 put something in their place. So the state has every interest
9 in ensuring that there is a functioning backup system in
10 addition to your Court's order.

11 THE COURT: It is a very delayed production on the
12 state website of the -- of the audio or the minutes of the
13 meeting.

14 But you do keep an audio, don't you?

15 MR. TYSON: I believe we do.

16 THE COURT: It is just --

17 MR. RUSSO: That has happened different ways over the
18 years. Sometimes they have filmed, and it has been up. I
19 don't know what the current Secretary of State is necessarily
20 doing.

21 THE COURT: Having a transcription or whatever?

22 MR. RUSSO: There is usually a transcript. There are
23 always minutes, of course.

24 THE COURT: Let's just make sure that there is a
25 transcript.

1 MR. BROWN: Then, Your Honor, with respect to the
2 next bundle of issues concerns the scheduling for the new
3 motion for preliminary injunction. And Mr. Cross is going to
4 take the lead on that --

5 THE COURT: All right.

6 MR. BROWN: -- discussion if you're ready for that.

7 THE COURT: A/K/A Ms. Kaiser.

8 MS. KAISER: It will actually be Mrs. Kaiser.

9 THE COURT: Mrs. Kaiser. Excuse me.

10 MR. CROSS: Trade up, Your Honor. We are trading up.

11 MS. KAISER: Your Honor, we would propose that we
12 schedule a hearing on the preliminary injunction motion with
13 regard to the BMD-related claims no later than the last week of
14 January. We realize that we need to get through the holidays.
15 But we are very interested in moving this forward as quickly as
16 possible.

17 We can be ready earlier if the Court is ready
18 earlier. And -- but we think that the last week of January is
19 the latest that we should go in terms of -- in terms of
20 scheduling a hearing.

21 And in the interim, Your Honor, we do think that both
22 parties should have some expedited discovery prior to that
23 hearing. We are willing to discuss with defendants what is
24 reasonable.

25 But we could also make some proposals to Your Honor

1 today. For example, we think each party should be permitted to
2 between five to ten depositions -- I'm sorry -- each side that
3 would be allocated between the different plaintiff groups and
4 defendant groups. And in addition, we think there should be
5 some written discovery along the lines of approximately 30
6 RFAs, approximately 5 interrogatories, and approximately 5
7 requests for production of documents.

8 And we also think, Your Honor, that we should -- that
9 the Court should require expedited responses to the discovery
10 requests. I believe under the current -- under the Court's
11 current order that each side gets 15 days to respond. But that
12 would just be responses and objections and that there is 30
13 days to actually produce documents in response to document
14 requests. I think we would propose to shorten that to
15 something more like 15 to 20 days.

16 THE COURT: Thank you.

17 MS. KAISER: Thank you.

18 THE COURT: Well, I know that the state doesn't think
19 there should be anything. And I understand that. You know, I
20 have obviously considered it strongly.

21 But if we were in a position that I was going to have
22 a hearing, what would you think would be a reasonable schedule
23 and would you comment on that?

24 MR. RUSSO: Your Honor, we think that having a
25 hearing in January, especially late January -- there is just a

1 practical issue with having that hearing then because we're
2 going to be running up against early voting in February for the
3 2020 presidential preference primary.

4 THE COURT: The election is March what?

5 MR. RUSSO: I have brought actually a copy of the
6 state's election calendar.

7 THE COURT: Thank you.

8 MR. RUSSO: So, your Honor, this is the 2020 state
9 election calendar. You'll see that the voter registration
10 deadline is, of course, February 24 for the PPP with the
11 election being March 24. Early voting is scheduled to begin on
12 March 2nd.

13 So if we have a hearing at the end of -- at the end
14 of January and depending on when Your Honor issues an order and
15 what that order says, we would -- we do think we would be
16 running up against that early voting deadline.

17 You know, there is also the practical issue of the
18 impact on the rollout of the new -- of the new system. If the
19 claims are just about the bar code, I'm not sure there is that
20 much discovery that really needs to be conducted.

21 So, Your Honor, our position is that the motion to
22 dismiss is still pending. We think the Court should enter a
23 decision on that. And the parties should set a trial date.
24 And discovery can go through the regular process rather than
25 another expedited process. This is the third PI hearing we

1 would be having in this case. And move forward in a normal
2 manner.

3 THE COURT: So I feel a little bit in the dark still
4 though about what the process is for the state's evaluation of
5 the rollout and whether there are some critical issues that
6 have to be addressed in the next -- and what the time frame for
7 doing that is and what the fallback plan is, other than my
8 fallback plan.

9 MR. RUSSO: Yeah. As Mr. Tyson mentioned, of course,
10 there is -- the State Election Board is going to have rules
11 promulgated later this month as to the backup plan on hand
12 marked paper ballots. So that is clear.

13 THE COURT: Is there a formal evaluation that has
14 been done of the trial?

15 MR. RUSSO: There was a document --

16 THE COURT: I read in the newspaper, as I candidly
17 have said. But I don't have the evaluation.

18 MR. RUSSO: I believe attached as Exhibit A to the
19 Coalition's filing last night --

20 THE COURT: The evaluation is attached?

21 MR. RUSSO: There is an evaluation attached to it.
22 It is -- we can provide you this copy if you would like.

23 THE COURT: Thank you.

24 MR. RUSSO: There is an overview on issues. In none
25 of the materials that were filed last night were there any

1 claims of vote flipping or any of the issues that we typically
2 saw with -- being raised with respect to the DREs.

3 You know, at the end of the day, Your Honor, it is a
4 pilot program. It is intended to go find any kind of problems,
5 technical issues that can then be resolved.

6 There were, I guess, issues with the hand marked
7 paper ballot pilot also in Cobb County. I think those are
8 referenced in one of the articles included in the plaintiffs'
9 materials that were filed last night also.

10 Also just regarding voters not voting the ballots
11 properly, frankly crossing out names of the candidates that
12 they didn't want to select and putting Xs through the bubbles.
13 And I can point you to that.

14 But that is where we are in terms of reports. We
15 will ask our client if they expect the counties to provide more
16 reports to them. And we can report back to you. I just do not
17 know.

18 THE COURT: All right. Even if the answer is no,
19 just let me know.

20 MR. RUSSO: Yes, ma'am.

21 THE COURT: All right. Thank you. I'll give you
22 back Exhibit A. I'll print it out if it was filed. I didn't
23 see it.

24 MR. BROWN: Your Honor, on the timing, what the
25 motion for a preliminary injunction will be focused on is the

1 narrow issue of the interface between the voter and the vote,
2 which is either the BMD or paper ballot.

3 Your Honor has already ordered that they have a
4 default system of the paper ballot ready. And so that because
5 of that, Your Honor will not be in the catch 22 that you found
6 yourself back in 2018 because the remedy has already been
7 ordered by Your Honor. And the question -- the only question
8 will be whether as a matter of constitutional law that remedy
9 is required.

10 And so we believe that the schedule outlined by the
11 Curling plaintiffs is realistic and that it will not put any of
12 the parties in a prejudicial position going forward into the
13 March 24th elections and that if -- and the presidential
14 primaries actually -- the March 24th election, although
15 enormously important obviously, the complexity of the ballot
16 building is limited because it is only the federal presidential
17 primary. There is no other elections on it. So there is some
18 clarity there as well.

19 We would -- our main concern -- from the Coalition
20 standpoint, our main concern is with the timing of the hearing
21 and then we can back up from that reasonable discovery. And it
22 will be limited discovery and very focused. We may want to
23 have a little bit more of the written discovery to make it
24 easier than was outlined by the Curling plaintiffs. But
25 certainly --

1 THE COURT: You agree that no one else has litigated
2 the question of the bar code?

3 MR. BROWN: I think that is correct.

4 THE COURT: And when is the earliest usage of the bar
5 code?

6 **(There was a brief pause in the proceedings.)**

7 MR. BROWN: Our understanding is in the last five
8 years or so.

9 THE COURT: Have there been any -- I realize this is
10 getting into the facts. But have there been any evaluations of
11 the efficacy of the bar code systems? You don't have to tell
12 me what they are. I just want to know.

13 MR. CROSS: Do you mean by the states or by experts?

14 THE COURT: By experts. By independent experts.

15 MR. BROWN: Not by experts. We don't -- not yet.

16 MR. CROSS: There are tests of the efficacy of the
17 bar codes by election security experts. If you're asking like
18 a formal sanctioned by a state, I'm not aware of that, if that
19 is what you are asking.

20 MR. RUSSO: I also wanted to raise one additional
21 issue with regards to the timing and how it will affect
22 elections in Georgia. As you know, Representative Powell
23 passed away. He's House District 171. The state will be
24 having to have a special election for that seat. Decatur
25 County is one of the counties, which had the BMDs already

1 rolled out. That district also covers Mitchell and Colquitt
2 Counties.

3 The Governor is going to have to issue a writ of
4 election for that. We understand right now that the date of
5 that election will be January 28th. And a writ should be
6 issued sometime today. And early voting, of course, will then
7 start 30 days prior to that. Although early voting will start
8 in 2019, the state is going to use BMDs, of course, for all of
9 them. And those counties are being prioritized for the
10 rollout.

11 MS. KAISER: Your Honor, just two quick points if I
12 may. To our knowledge, there are no other states that are
13 using bar codes on a statewide basis. We think Georgia is
14 unique in that aspect.

15 The second point, Your Honor, just reiterating what
16 Mr. Brown said, you know, last time we were challenging the
17 entire election system. This time, the remedy would really
18 just be swapping out hand marked paper ballots for the BMDs.
19 And that would require a lot less time, money, and effort. And
20 in addition, the defendants already have to have that in place
21 under Your Honor's existing order. Thank you.

22 THE COURT: All right. Well, I think I have covered
23 everything I planned to cover at least as I articulated in
24 Document 671.

25 Is there something else that I missed that I needed

1 to -- you are all going to meet and talk about the disposition
2 of the machines. I would like you to do that -- it is
3 Friday -- to have it done by -- try today to figure out your
4 schedule and have an objective for trying to get it done by
5 next Friday.

6 MR. TYSON: Your Honor, I just wanted to provide the
7 code section, 21-2-281, that references paper ballots. The
8 only paper ballots at a precinct on election day are
9 provisional ballots. And so the statute says paper ballots.
10 The state uses provisionals, the provisional ones that are at
11 the site of the precinct on that particular day.

12 THE COURT: I think really the issue for me is that
13 21-2-281 -- and you are properly representing what it says --
14 really deals with -- in any primary election in which the use
15 of voting equipment is impossible or impracticable. And you
16 have indicated that essentially the construction of that is
17 that it is -- either that it is -- the whole election is not
18 possible, rather than some of the machines may work and some of
19 the machines may not work and people may be out the door or
20 that it is not recording things properly for some of the
21 machines.

22 MR. TYSON: Yes, Your Honor. That's correct.

23 The only other issue I did want to raise about the
24 FBI server image, just so you are clear on that, we had worked
25 out with the plaintiffs previously on that point. The

1 plaintiffs' vendor currently has all of the copies of the FBI
2 server. We don't have a copy of that right now. So we'll
3 arrange with them to work that out in accordance with your
4 order. But I wanted to flag that for you.

5 THE COURT: Have you drafted a protective order that
6 you have all agreed on?

7 MR. CROSS: That lies with me unless they want to
8 send one.

9 Do you want us to draft that? I think --

10 MR. TYSON: Yeah.

11 THE COURT: Because you might as well try to -- if
12 you are having to talk to get it done on the same time line as
13 next Friday.

14 MR. CROSS: Right.

15 MR. TYSON: Okay. Of course, Your Honor.

16 THE COURT: Since I am going to disappear on you on
17 the 21st. So if you use the 20th, it will just waste time.

18 MR. TYSON: Your Honor, we still obviously take the
19 position it is not relevant to any claims. We don't want to
20 concede that.

21 THE COURT: I understand.

22 MR. TYSON: Thank you.

23 THE COURT: All right. Well, I think that is it
24 then. Thank you for your patience and your presentations. I'm
25 most appreciative.

1 Thank you for the audience, which it is not that I'm
2 looking for an audience. But I very much appreciate that
3 citizens are always interested and come here and are engaged.
4 Thank you.

5 Any reason we shouldn't adjourn at this time?

6 MR. BROWN: No, Your Honor.

7 THE COURT: Thank you very much.

8 MR. TYSON: Thank you, Your Honor.

9 COURTROOM SECURITY OFFICER: All rise. Court is in
10 recess.

11 **(The proceedings were thereby concluded at 1:23**
12 **P.M.)**

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C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 88 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 8th day of December, 2019.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
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